

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMON O. SMITH,	§
	§ No. 778, 2010
Defendant Below-	§
Appellant,	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0511016328
	§
Plaintiff Below-	§
Appellee.	§

Submitted: February 15, 2011

Decided: March 7, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 7th day of March 2011, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Damon O. Smith, filed an appeal from the Superior Court’s December 9, 2010 violation of probation (“VOP”) sentencing order. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court’s judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

¹ Supr. Ct. R. 25(a).

(2) The record before us reflects that, in June 2006, Smith pleaded guilty to Robbery in the First Degree and a lesser-included charge of Rape in the Third Degree. The State dismissed additional kidnapping, first degree rape and weapon charges. In April 2007, Smith was permitted to withdraw his guilty plea and subsequently pleaded guilty to Robbery in the First Degree and Rape in the Fourth Degree. On the robbery conviction, Smith was sentenced to 15 years of Level V incarceration, to be suspended after 5 years for 2 years at Level III probation. On the rape conviction, he was sentenced to 5 years at Level V, to be suspended for 2 years at Level III.

(3) In October 2010, Smith was arrested and charged with a number of drug offenses. He pleaded guilty to one count of Maintaining a Dwelling for the Keeping of Controlled Substances and was sentenced to 3 years at Level V, to be suspended for 1 year at Level IV Crest, in turn to be suspended after successful completion of Crest for 1 year at Level III Aftercare.

(4) As a result of these new charges, Smith was found to have committed a VOP with respect to his 2007 sentences. He was re-sentenced on the robbery conviction to 10 years at Level V, to be suspended after successful completion of a Level V drug treatment program, to be followed by 2 years at Level III. On the rape conviction, Smith was re-sentenced to 5 years at Level V, to be suspended for 2 years at Level III.

(5) In this appeal, Smith claims that his VOP sentence for robbery is improper. He contends that he should not have been sentenced to 10 years at Level V and should not have been sentenced to a drug program that will do him “more harm than good” due to his underlying mental illness.

(6) In sentencing a defendant for a VOP, the Superior Court is authorized to impose any period of incarceration up to and including the balance of the Level V time remaining to be served on the original sentence.² This Court will not disturb a sentence imposed by the Superior Court unless it is demonstrated that the sentence is either beyond the maximum permitted by law or is the result of vindictive or arbitrary action on the part of the Superior Court.³

(7) Because Smith had 10 years remaining on his original robbery sentence, the 10-year sentence imposed by the Superior Court was within the authorized limits. Moreover, there is no evidence in the record before us that the sentence imposed was the result of vindictive or arbitrary action on the part of the Superior Court. As such, we conclude that Smith’s claims are without merit.

(8) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

² *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999); Del. Code Ann. tit. 11, §4334(c).

³ *Mayes v. State*, 604 A.2d 839, 843 (Del. 1992).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice